STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

UNITED COMMUNICATIONS SYSTEMS, INC. d/b/a CallOne Petition for Arbitration of an Interconnection Agreement with Illinois Bell Telephone Company, d/b/a SBC Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996	))))))	Docket No. 03-0772

SBC ILLINOIS' RESPONSE TO MOTION TO COMPEL

SBC Illinois, by and through its attorneys, respectfully submits its response to United Communication Systems, Inc's ("UCS") Motion to Compel. For the reasons set forth below, UCS' motion should be denied.

I. INTRODUCTION

The Commission's rules for arbitrations under the Telecommunications Act of 1996 allow for discovery, but they are not conducive to fishing expeditions; driven by the tight timetables of the 1996 Act, they contemplate only seven days for discovery responses.[1] Accordingly, discovery has been limited in arbitration proceedings, including arbitrations that involve many more issues than this one. Consider the last three multi-issue arbitrations to which SBC Illinois has been a party:

- AT&T's arbitration petition in Docket 03-0239, set forth more than 100 issues for arbitration, but AT&T – no slouch at aggressively pursuing its litigation interests – propounded no discovery.
- In Docket 01-0338, where TDS raised 70 issues for arbitration, TDS did serve discovery along with its petition. TDS propounded a total of 7 data requests.

[1] 83 Ill. Admin. Code § 761.110(a)(4) requires the petitioner to serve any discovery along with its petition, and § 761.210(a) calls for responses "no later than 7 days after filing of the petition." Similarly, § 761.210(a) and (b) contemplate 7 days for the petitioner to respond to the respondent's discovery requests.

- In Docket 01-0623, McLeod set forth 85 issues for arbitration. McLeod served discovery along with its petition: 20 discrete data requests.

Against that background – particularly the very limited time for responding to discovery – UCS' discovery requests at first blush appear to be some sort of sadistic prank. There were 184 of them – 72 interrogatories, 84 document requests and 28 requests to admit. And the breadth of many of the interrogatories and data requests is stunning. Merely by way of example:

> Interrogatory 5: Set forth the wholesale discount rates that are applicable to the resale of ICBs in each state in which SBC is an ILEC and all reasons why SBC contends that these rates are correct including, but not limited to, references to any and all applicable Commission dockets, and identification of relevant Avoided Cost Studies and methodologies.
>
> > Really? All thirteen SBC states? *All* the reasons that each rate is "correct"? Any and all state commission dockets, cost studies and methodologies?
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> Interrogatory 16: State the number of retail end users and resellers that have exceeded the MAD at the highest revenue commitment tier since the inception of the MAD, the number of retail end users and resellers that have exceeded their MAD (regardless of the revenue commitment tier) since the inception of the MAD, and *separately for each retail end user and reseller that has exceeded its MAD, identify the discounts received during each year of its commitment*. (Emphasis added.)
>
> > Separately for each retail end user and each reseller – for each individual year of its commitment? How many man/days should SBC Illinois expend to figure this out?
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> Document Request 6: Produce all Documents that reflect, refer or relate to any and all discussions with an employee or agent of your company with any other person (whether such person is an SBC employee) on the subject of the appropriate discount rate for the resale of ICBs to new and existing customers.
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> > Since SBC Illinois presumably does not maintain a file labeled "documents that reflect, refer or relate to discussions between an SBC employee or agent and any other person concerning appropriate discount rates for ICBs," how many weeks does SBC Illinois get to search all of its employees' files for pieces of paper (if there are any) that are responsive to this request?

> Document Request 30: Produce for each historical tariff change to a Telecommunications Service for which a retail end user and/or a reseller has made a volume and/or term commitment all Documents relating to (i) the nature of each tariff change, and (ii) how that tariff change affected the retail end user and/or resellers then existing commitment to SBC, including (i) which retail end users and/or resellers commitment were modified to incorporate such tariff change, (ii) which retail end users and/or resellers commitment were not modified to incorporate such tariff change, (iii) which retail end users and/or resellers converted to another SBC offering and identify such offering, (iv) which retail end users and/or resellers terminated their commitments based on such tariff change, (v) which retail end users and/or resellers did SBC impose termination penalties upon and (vi) any other changes to a commitment SBC sought to impose or apply or did in fact apply concurrent with such tariff change.
>
> > Let's see. First we identify each and every service for which either an end user or a reseller has made a volume commitment or a term commitment. Then, we research every tariff change that has ever affected each such service. Then, we search for all documents that have anything to do with these six categories things relating to each such tariff change. How many people do we devote to this project, and how long do they have to complete it?

Data requests like these might be borderline plausible in a massive civil lawsuit where discovery can take two or three years. But not in an arbitration that a state commission has about four months to decide,[2] and where the Commission's rules contemplate seven days for discovery responses.[3] And certainly not where, as Section 200.340 of the Commission's rules provides,

> It is the policy of the Commission not to permit requests for information, depositions, or other discovery whose primary effect is harassment or which will delay the proceeding in a manner which prejudices any party or the Commission, or which will disrupt the proceeding.

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[2] The 1996 Act requires the Commission to conclude the arbitration nine months after negotiation was requested, and the petition for arbitration must be filed between 135 and 160 days after negotiation is requested. Nine months less 135-160 days leaves about four months between the filing of the petition and the issuance of the arbitration decision.

[3] Yes, UCS, having served the discovery a week before Christmas did agree to extend the due date to the day after New Year's. In the scheme of things, it makes no difference that SBC Illinois had two weeks (over the holidays) rather than the usual one week to pull together its responses. Nor does it matter that UCS agreed to drop one sixth of its most pointless data requests; the 150 that remained were still beyond the pale.

Given the inordinate number of UCS' requests, and the unmanageable breadth of many of them, there can be no question but that the "primary effect" of the requests (whether intentionally or not) was to harass. And this becomes all the more clear when one takes into account the (at best) tenuous connection between many of UCS' data requests and the issues in this case. We discuss that below.

The Commission should deny UCS' motion to compel SBC Illinois to respond to UCS' oppressive and in large part irrelevant discovery requests. Contrary to UCS' assertions, SBC Illinois has provided substantial information and documentation to UCS. Moreover, SBC Illinois offered to provide more, and is still willing to do so. During the parties' discussions concerning UCS' requests and SBC Illinois' objections, SBC Illinois identified thirty requests (in addition to those to which it has responded) that it said it would answer in order to resolve the parties' discovery disputes. That was an eminently reasonable offer, and SBC Illinois suggests that the ALJ either deny UCS' motion or resolve the motion by directing SBC Illinois to respond to those thirty requests.

Finally, UCS' accusation that SBC Illinois flouted the discovery rules by serving baseless objections and by failing to participate in good faith in the meet and confer process barely warrants a response. SBC Illinois' objections to UCS' misguided discovery not only were not baseless, but were, as we demonstrate below, well-founded. And SBC Illinois met and conferred with UCS responsibly and in good faith in an effort to resolve the parties' differences.[4]

[4] As SBC Illinois told UCS in the letter that is Exhibit B to UCS' motion, the account of the parties' discovery discussions in the letter that is Exhibit A to UCS' motion is not accurate. SBC Illinois also does not agree with depiction of those discussions in the motion to compel. SBC Illinois does not belabor the point, however, because it believes the ALJ is not interested in refereeing a debate about who said what during those discussions.

II. ARGUMENT

A. UCS' Motion to Compel Responses to Irrelevant and Overly Burdensome Interrogatories and Document Requests Should Be Denied.

UCS' motion to compel is directed, in part, to 56 interrogatories and 58 document requests. All 114 of those items fall into one or more of the following categories:

- SBC Illinois has already responded – in some instances by stating it does not have the requested information
- the request is overly broad and unduly burdensome
- the information requested is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence
- SBC Illinois has indicated it is willing to respond, pursuant to an agreement or a ruling that requires SBC Illinois to respond to thirty specified interrogatories, data requests, and requests for admission

Attached hereto are the matrices that were Appendix A and Appendix B to UCS' motion to compel. SBC Illinois has added an additional column on the right of each appendix, which it has populated with remarks that indicate into which category(ies) each request falls and that also include appropriate elaboration. Below, we briefly address the first three categories.

1. Interrogatories/document requests to which SBC Illinois has responded

SBC Illinois has responded fully to a number of the interrogatories and document requests at issue – albeit in some instances by stating that it does not have the requested information. That is not good enough for UCS, however. It is instructive to see why not. We will use Interrogatory 16 as an example. Interrogatory 16 asks:

> State the number of retail end users and resellers that have exceeded the MAD at the highest revenue commitment tier since the inception of the MAD, the number of retail end users and resellers that have exceeded their MAD (regardless of the revenue commitment tier) since the inception of the MAD, and separately for each retail end user and reseller that has exceeded its MAD, identify the discounts received during each year of its commitment

Not surprisingly, SBC Illinois does not keep records of how many end users or resellers have exceeded the MAD at the highest revenue commitment tier since the inception of the MAD, or records of the other information that interrogatory calls for. To be sure, it is conceivable that SBC Illinois might be able to figure out the answers to the interrogatory by assigning a team to the project, scouring its records and writing a computer program to compile and analyze the requested information. SBC Illinois has no obligation to undertake such a project, however – it would be far too burdensome. Accordingly, SBC Illinois responded to the interrogatory as follows:

> SBC Illinois objects to this data request on the basis that it is overly broad and unduly burdensome. Notwithstanding and without waiving this objection, SBC Illinois states that it does not have this information

That should have been the end of the matter – SBC Illinois does not have the information. UCS, though, has nonetheless moved to compel SBC Illinois to provide the information it does not have. Why? Because, according to UCS, there is an inconsistency in SBC Illinois' response. "At a minimum," UCS asserts, "SBC's objection must be stricken; it is inconsistent to claim that a request is "burdensome" while also claiming that SBC has no responsive information." That contention is silly – there is no inconsistency. What SBC Illinois' response means, of course, is that (i) SBC Illinois does not have the information, and (ii) to the extent that SBC Illinois might be capable of somehow deriving the information from the records it does have, it would be unduly burdensome for SBC Illinois to do so. There is nothing the least bit unusual or untoward about a response that says the request is unduly burdensome and that the respondent does not have the requested information. What is unusual and untoward is UCS' pursuit of this interrogatory in the face of SBC Illinois' response.

UCS' treatment of Interrogatory 26 is similarly bizarre. In response to a request for information that no one could reasonably expect any company to maintain, SBC Illinois stated that "it does not have this information."[5] Nonetheless, USC' motion is directed at Interrogatory 26. How, one wonders, does USC deal this time with the fact that SBC Illinois does not have the requested information? By asserting, "UCS is surprised that SBC does not have this information." UCS' state of mind is hardly a basis for asking the Commission to compel SBC Illinois to produce information it does not have.

Needless to say, the Commission should deny UCS' motion to compel responses to data requests to which SBC Illinois has already responded – including those to which SBC Illinois has responded by stating it does not have the requested information.

2. Overly broad and unduly burdensome interrogatories/document requests

SBC Illinois properly objected to many of UCS' interrogatories and document requests on the ground that they are overly broad and unduly burdensome. We gave a flavor of the ways in which the requests are overly broad and unduly burdensome at pages 2-3 above, where we quoted and commented on two of the interrogatories and two of the document requests. If an additional example would help drive the point home, consider Interrogatory 23:

> Identify all audits of SBC's books, records, data and other documents to verify the accuracy of SBC's billing systems and invoices performed in the six years period prior to the date of your response pursuant to interconnection agreements with CLECs. Please identify whether

[5] The interrogatory asks, "Please Identify each instance in which (i) an SBC customer changed service providers to a CLEC, (ii) the SBC Customer Service Record failed to show a termination liability, and (iii) SBC sought to impose a termination liability on that end user retail customer. For each such instance, please set forth: (i) The amount of termination liability required in the contract or tariff; (ii) the amount of termination liability that SBC initially requested that the end user retail customer pay; (iii) whether, when notified of the termination liability, the end user customer made a payment of termination liability and if so, the amount; (iv) whether, when notified of the termination liability, the end user determined to return to SBC, and (v) the number of days between SBC's receipt of notice that the end user was switching its service from SBC to a CLEC and the end user's receipt of notice from SBC of the termination liability."

> discrepancies in bills and invoices were identified by the audit, and whether, as a result of the audit, there was a net adjustment in the charges paid or payable by the auditing party by an amount, on an annualized basis, greater than five percent (5%) of the aggregate charges for the audited services during the period covered by the audit.

Ponder what that interrogatory – just one of UCS' 184 initial data requests – asks for, and the time and expense it would take to respond to it. *All* audits during the last *six years* to verify the accuracy of *any* SBC billing system or invoice AND, for each audit, an identification of all identified discrepancies and the ultimate resolution of the audit. And to what end? So that *maybe* UCS can make a couple of marginal arguments that are not likely to help the Commission resolve any of the arbitration issues in any event.[6] Thus, the interrogatory is both absolutely burdensome – *i.e.*, it would take a tremendous investment of time and money to respond to it – and *unduly* burdensome – *i.e.*, the potential payoff for the investment is, at best, modest.

UCS contends that "SBC's objections based on burden are improper, because the burden is not identified, and because SBC declined UCS' invitation to discuss, on a request-by-request basis, how the request could be changed to reduce the alleged burden on SBC." That contention fails, for several reasons: (1) the burden is in all or almost all instances self-evident; (2) no statute, rule or principle of law requires the party asserting an objection to describe the burden with more particularity than SBC Illinois did; and (3) SBC Illinois did not decline a UCS invitation to discuss how to reduce the alleged burden.

The attached matrices identify the interrogatories and document requests that are overly broad and unduly burdensome. Generally, the nature of the undue burden is apparent from the data request and/or the commentary in the right-hand column on the matrices. Two sorts of

[6] UCS states, for example, "UCS believes SBC has problems with its billing systems that make it more likely that UCS will have to request an audit to determine the amount that it should be billed." The accuracy or inaccuracy of UCS' belief in that regard is at most tangentially related to the audit issue the Commission has been asked to decide.

unduly burdensome requests, however, warrant additional discussion here: contention interrogatories and what we will refer to as unbounded document requests.

a. Contention Interrogatories

Thirty-three of UCS' interrogatories are "contention interrogatories." The contention interrogatories are of two sorts. One asks SBC Illinois to state all the reasons why it contends something. For example:

> Interrogatory 35:
> Set forth all reasons why SBC contends that its interconnection agreement with UCS should not have a term longer than one year and Identify all Documents that support any of these reasons Interrogatory

The other asks SBC Illinois to state whether it contends something. For example:

> Interrogatory No. 55:
> State whether SBC contends that UCS is entitled to the same discount that SBC provides to its retail end users when UCS purchases a volume-based discount tariff offering from SBC for resale, set forth all reasons for such contention and Identify all Documents that support SBC's position.

Under the schedule that was set for this proceeding on December 24, 2003, SBC Illinois' responses and objections to UCS' data requests were due on January 2, 2004, exactly 17 days before the due date for SBC Illinois' prefiled testimony – testimony which would, of course, set forth SBC Illinois' positions and the reasons for them. It makes no sense – particularly in light of the constraints on discovery in interconnection arbitrations discussed above – to require a party to give a preview of its contentions and the reasons for its contentions 17 days before it is going to file its testimony. Indeed, SBC Illinois is aware of no instance in which this Commission has required any party to an arbitration to respond to contention interrogatories of this sort. Thus, SBC Illinois properly objected to UCS' contention interrogatories; typically, SBC Illinois objected that they were unduly burdensome and stated that its contentions, and the reasons for them (to the extent the requested contentions and reasons were relevant) would be

"set forth in SBC Illinois' forthcoming Response to UCS' Petition for Arbitration and in SBC Illinois' testimony and other submissions in this proceeding."

UCS provided its position on contention interrogatories in the matrix attached to its motion to compel:

> The propriety of contention interrogatories is expressly recognized under Fed. R. Civ., P. 33(c). Furthermore, SBC improperly states that certain information will be set forth in testimony and in its response to the Petition for Arbitration, both of which are not due until after UCS files its testimony. This is inappropriate under the ICC rules because UCS is entitled to receive SBC's discovery responses prior to filing its testimony. Regardless, SBC has not committed to providing in its testimony all the information requested. SBC also vaguely references "other submissions" without stating what those submissions are and when the information will be provided. This is not an adequate or proper response

That is no basis for requiring a response to UCS' contention interrogatories. In the first place, the Federal Rules of Civil Procedure do not apply here, and there is no support for USC' contention interrogatories in this Commission's rules of practice or in its arbitration rules. And however appropriate such interrogatories might be in a prolonged civil lawsuit of the sort governed by the Federal Rules – where there may be multiple rounds of discovery, including depositions, over a period of years before the actual trial testimony is introduced – they are not appropriate in a proceeding where the party's testimony, which will contain the party's contentions and the reasons therefore, is to be filed mere days after discovery responses are due. For the most part, SBC Illinois' contentions and the reasons for those contentions are set forth in SBC Illinois' February 13, 2004, testimony – just as UCS' contentions and the reasons for those contentions are set forth in UCS' testimony. The "other submissions" in which SBC Illinois may set forth additional contentions and reasons (depending on intervening developments) are, of course, SBC Illinois' rebuttal testimony and briefs. Contrary to UCS' implication, UCS had no right to those contentions and the reasons for them before it filed its initial round of testimony.

In fact, SBC Illinois had every right to tailor its contentions and the reasons for its contentions to UCS' testimony. There is no reason to believe that UCS will be disadvantaged in any way by adhering to the normal process – the process to which every other petitioner in Illinois has adhered – whereby UCS will learn everything it needs to know about SBC Illinois' positions and the reasons supporting them through SBC Illinois' testimony and briefs – the same means by which SBC Illinois will learn UCS' positions and the reasons for them.

b. Unbounded document requests

Consider the following document request, and how SBC Illinois might go about foraging for documents that respond to it:

> Document Request 32: Produce all Documents relating to the justification for, or effect of a MAD.

The problem, of course, is that such documents might be nowhere and they might be just about anywhere. If one reads the request broadly (as UCS presumably wishes), virtually any document in SBC Illinois' possession that makes any reference to a MAD qualifies, because just about any document that refers to a MAD can be seen as "relating to" the "effect" of a MAD. If, on the other hand, one reads the request narrowly to pertain only to documents that include explicit discussion of the justification or effect of a MAD, there may be few if any such documents. In either case, though, there is almost no limit to where SBC Illinois might be expected to search. This simply is not a manageable document request in an arbitration under the 1996 Act.[7] And UCS propounded many such requests. Another example:

> Document Request 42: Produce copies of all Documents that Relate to SBC's design of its Save and Winback offerings.

[7] Compare, for example, the following document request from one of the arbitrations identified on page 1 above: "Provide a copy of Ameritech Illinois' forecasts provided to its directory affiliate for each of the last three calendar years." Documents like that, assuming they exist, should not be hard to find.

Even if such documents were relevant, which they are not, SBC Illinois could not reasonably be expected to locate, gather and produce copies of all documents that relate to the design of all Save and Winback offerings. Accordingly, SBC Illinois has objected to such unbounded document requests on the ground that they are unduly burdensome.

3. Irrelevant (or marginally relevant) interrogatories/document requests

The number and scope of UCS' data requests are symptoms of a fishing expedition. So are the connections between many of the requests and the issues in the case; the connections are thin or non-existent. For example:

> Interrogatory 5: Set forth the wholesale discount rates that are applicable to the resale of ICBs in each state in which SBC is an ILEC and all reasons why SBC contends that these rates are correct including, but not limited to, references to any and all applicable Commission dockets, and identification of relevant Avoided Cost Studies and methodologies.
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> > Irrelevant, in part because SBC Illinois has never contended that the wholesale discount rates for ICBs in each state in which SBC is an ILEC are "correct."
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> Interrogatory 39: Please Identify all ICBs that have been assumed by a CLEC for resale to the same end user that was previously receiving service from SBC under the ICB in Illinois and describe whether these ICBs were resold using section 5/13-509 of the PUA or some other process, and describe the applicable process.
>
> > Irrelevant, because SBC Illinois has agreed to make the ICBs available via website, which is what UCS wanted and which SBC has not previously done. Thus, it makes no difference what "other process" may have been used in the past to resell ICBs. On the matrix, UCS states that the information sought by this interrogatory is "relevant to determine whether the process suggested by SBC has been used and is viable." That is clearly wrong. How can a description of other processes shed light on the viability of the web-based process SBC Illinois has agreed to make available?

Document Request 73: Produce all Documents that Relate to any internal or externally requested audit results on SBC's Resale Services billing.

> Irrelevant or marginally relevant. UCS contends in Appendix B that the requested information is "relevant to determining the accuracy of SBC's billing, which implicates (1) USC's ability to timely file a dispute (Issue 22), (2) whether UCS would have to place in escrow dispute amounts that will be resolved in UCS' favor (Issue 7) and (3) the necessity and perhaps frequency of UCS requesting an audit to ensure it has been billed in accordance to the rates in the agreement (Issue 23)." In other words, UCS wants to search for a needle in a haystack so it can use the needle to make a tiny point that might relate to issues in the arbitration. The haystack is *all* documents that relate to *any* audit of any aspect of SBC Illinois' resale billing. The needle would be evidence that SBC Illinois sent an incorrect resale bill. And the point would be, "SBC Illinois' resale billing systems are prone to error, so (for example) if SBC Illinois sends UCS a bill and UCS wants to dispute the bill, UCS should not have to put the disputed amount in escrow, because the dispute will probably be resolved in UCS' favor. Of course, if UCS did try to make that point, SBC Illinois could then put in vast volumes of evidence showing all the accurate bills it has sent, and we could have a trial within a trial concerning exactly how accurate SBC Illinois' billing systems are – just to shed a bit of light on an issue to which the accuracy of SBC Illinois' billing systems are only marginally relevant.

What is the significance of SBC Illinois' characterization of document request 73 as "irrelevant or marginally relevant"? Isn't information discoverable if it is marginally relevant? The answer is no, not if the burden of producing the haystack is disproportionate to the size of the point the needle can make if the needle is found. Thus, even if the ALJ were to conclude that some documents sought by this request might have some tangential bearing on the issues in the case, the ALJ nonethess would properly deny the request for discovery on the ground that it is unduly burdensome.

The irrelevance of many of UCS' interrogatories and document requests is explained in the right-hand column of Appendices A and B.

* * *

In sum, UCS' interrogatories and document requests, to the extent SBC Illinois has not already responded to them, are unduly burdensome, both in the aggregate and individually, and are, in many instances, irrelevant to the matters at issue in this arbitration. Accordingly, UCS' motion to compel responses to those data requests should be denied. In the alternative, the ALJ should resolve the motion by directing SBC Illinois to respond to the data requests that SBC Illinois has proposed to answer, which are identified on the attached appendices.

B. The Commission Should Sustain SBC Illinois' Objections to UCS' Requests to Admit.

In addition to the 72 interrogatories and 84 document requests, UCS also served SBC Illinois with 28 Requests to Admit. SBC Illinois objected to them on several grounds, only one of which UCS addresses in its motion to compel. The ground that UCS addresses, as it appeared in SBC Illinois' objections, was that

> requests for admissions are not appropriate in arbitration proceedings where there is a short time frame for the entire proceeding, and the 'default schedule' in the administrative rule provides only seven days to respond to discovery. Requests for admissions are not commonly used in ICC practice, and are unnecessary and inappropriate in this proceeding. If applicable, Illinois S. Ct. Rule 216 provides 28 days for parties to respond to requests for admission. Given the shorter time in an arbitration proceeding, requests for admission are inappropriate.

SBC Illinois continues to believe that requests to admit are generally inappropriate in arbitration proceedings (especially when there are 28 of them, coupled with 156 interrogatories and document requests). More important for present purposes, however, is that SBC Illinois also objected to UCS' Requests to Admit on the grounds that they were "unduly burdensome [and] not relevant" – objections that UCS fails to mention in its motion to compel.

Many of UCS' Requests to Admit plainly are unduly burdensome. No. 8, for example, asks SBC Illinois to admit that "SBC has offered and sold its CompleteLink Save product without first receiving from the retail end users a copy of the proposal given by a competing

carrier." Counsel for SBC Illinois does not know whether the correct answer is "admitted" or "denied." If "denied" is the correct answer, though, it would take a tremendous amount of research to determine that fact. Likewise, it could take a tremendous amount of research to determine that the correct answer is "admitted." In fact, the only scenario in which it would not be unduly burdensome to respond to the request would be if the person making the internal inquiry were lucky enough to quickly find someone who knew of an instance in which a sale of the sort described in the request had occurred.

Since UCS does not address SBC Illinois' separate relevance objection to the Requests to Admit, there is no telling why (or even if) UCS believes each Request to Admit is relevant. Many of them, however, clearly are not. No. 25, for example, asks SBC Illinois to admit that "SBC stated to UCS during negotiations with UCS that section 13-509 provided UCS a substantive right to resell ICBs." Since section 13-509 either does or does not give UCS such a right, it is difficult, to say the least, to imagine how anything that SBC Illinois did or did not say to UCS on that score could affect the Commission's resolution of any issue in this case.

During the parties' discussions of UCS' data requests, SBC Illinois offered to answer nine of the Requests to Admit (along with the 21 interrogatories and document requests to which SBC Illinois offered to respond in order to resolve the parties' discovery differences). Notwithstanding that UCS' motion to compel offers no response to SBC Illinois' objections that the Requests to Admit are unduly burdensome and irrelevant, SBC Illinois continues to be willing to answer those nine, namely, numbers 1, 3, 4, 9, 10, 13, 19, 23 and 28. SBC Illinois again urges the ALJ to order the reasonable resolution of UCS' motion that SBC Illinois has proposed.

In any event, there is no basis on which the Commission could deem the Requests to Admit admitted, as UCS proposes. As the authorities cited by UCS make clear, a request to admit may be deemed admitted if the party on which they are served neither responds to them nor objects to them, but SBC Illinois objected to UCS' Requests to Admit. And SBC Illinois' objections not only were made in good faith, but were in fact sound and should be sustained.[8]

C. UCS Should Not Be Allowed to File Supplemental Testimony.

If the ALJ resolves UCS' motion to compel in the way that SBC Illinois has proposed, SBC Illinois will be responding to thirty data requests to which SBC Illinois has not previously responded. UCS asks that it be allowed to file an additional round of testimony to address the information it receives from SBC Illinois. That request should be denied.

UCS' request assumes that UCS will want to make the information that SBC Illinois provides part of UCS' case. There is no telling to what extent that will prove to be the case; UCS may find that little or none of the additional information it receives actually bolsters its claims. To the extent that UCS does want to make use of additional data request responses it receives from SBC Illinois, it can do so by, among other things, (1) introducing the responses into evidence; (2) using the responses when it cross-examines SBC Illinois' witnesses; and (3) discussing the responses in its briefs. There is no reason to believe that UCS will need to have its witnesses speak to the data request responses – and to the extent it does, it may well be able to accomplish that in the surrebuttal testimony that is already scheduled for April 8, 2004..

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[8] UCS suggests that the Commission can deem requests to admit admitted if the party on which they are served objects to them, but not in good faith. (Motion at 7.) UCS is wrong. Apart from the fact that SBC Illinois' objections were in good faith, there is no authority – certainly not either of the cases cited by UCS – for the proposition of law that UCS suggests. Quite the contrary, Ill. Sup. Ct. Rule 216(c), on which UCS relies, makes clear that a request is not deemed admitted in any instance in which the party to whom the request is directed serves "written objections on the ground that some or all of the requested admissions are . . . irrelevant or that the request is otherwise improper in whole or in part." That is exactly what happened here.

UCS' request for an additional round of testimony should therefore be denied. If UCS actually determines, after it receives additional information from SBC Illinois, that it wants to make affirmative use of that information and that it would be prejudiced if is not allowed to do so by having its witnesses address the information, USC can then renew its request, and the ALJ can consider it in a concrete context, rather than in the purely speculative mode in which the request is now presented.

D. UCS is not Entitled to Attorneys' Fees.

UCS' request for attorney fees under Illinois Supreme Court Rule 219(a) must be denied for at least three reasons:

1. Rule 219(a) allows for attorneys' fees only when a party's refusal to respond to interrogatories or failure to comply with a document request is "without substantial justification." As we have demonstrated, SBC Illinois' objections were, at a minimum, substantially justified.

2. Rule 219(a) applies only to civil and criminal proceedings (*see* S. Ct. Rule. 1. (West 2004)); this Commission has not adopted or otherwise made Rule 219(a) applicable to Commission proceedings.

3. No ICC rule authorizes an award of attorney fees where a party fails to respond to interrogatories or document requests.

III. CONCLUSION

The Commission should deny UCS' motion to compel and should direct SBC Illinois to provide responses to those interrogatories, document requests and requests to admit to which SBC Illinois has proposed to respond in this pleading.

Respectfully submitted,
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